Supreme Court, U.S.
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No. 91-134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HECTOR RIVERA MARTINEZ, a/k/a EL MEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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July 24, 1991

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QUESTION PRESENTED

Where defendant entered a plea of guilty in Four Counts of a Seven Count indictment, while under the influence of various medications (6 different benzodiasepines and (4) hypnotics—schedule IV controlled substances) which had been prescribed and provided by the penal institution's physician and which would alter his state of mind, whether the lower courts ruling denying his request to withdraw his guilty plea, more than two months before his sentencing, deprived him of all constitutional rights that surround the right to trial—"perhaps the most devastating waiver possible under our Constitution", as construed in *Dukes v. Warden*, 406 U.S. 250, 258, 92 S. Ct. 1551, 1555, 32 L.Ed.2d 45 (1972) and *U.S. v. Santobello*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d. 427 (1971).

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE COURT:

The petitioner, Hector Rivera Martínez, represented by José A. Fuentes-Agostini, Esq. respectfully prays that a *writ of certiorari* issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered against him in this case.

OPINION BELOW

The Opinion of the Court of Appeals (App. A, *infra*, pp. 1a-22a) is reported at 878 F.2d 1535 (1st Cir. 1989) and App. B, *infra*, pp. 23a-34a, reported at 931

F.2d 148 (1st Cir. 1991). The district court also rendered an Opinion which is reported at 693 F. Supp. 1358 (D.P.R. 1988).

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on April 26, 1991. The time within which to file a petition for a *writ of certiorari* extends to and including Thursday, July 25, 1991. Rule 13.1 of the Supreme Court of the United States. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The right to trial by jury in criminal prosecutions is specifically recognized and guaranteed in two places in the Constitution. Article III, Section 2, Clause 3, provides that:

> "The trial of all Crimes, except in Cases of Impeachment, shall be by jury. . . ."

The sixth amendment provides that:

> "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed. . . ."

OTHER PROVISIONS INVOLVED

Fereral Rule of Criminal Procedure 32(d) PLEA WITHDRAWAL. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the Court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, the plea may be set aside only on direct appeal or by motion under 28 U.S.C. sec. 2255.

STATEMENT OF THE CASE

The petitioner plead guilty to four counts of a seven count indictment involving violations to Title 21 U.S.C. secs. 848, 853, 841(a)(1), 846 and Title 18 U.S.C. sec. 2. A month and a half later petitioner requested leave to withdraw his guilty plea and requested permission to dismiss his legal counsel, as well as a term to obtain new legal representation.

Three weeks later a hearing on the matter was held and the petition denied.

Seven weeks later petitioner was sentenced. A timely appeal ensued. The sentence was vacated, but the order denying the plea withdrawal motion was affirmed. On resentencing, the lower court admitted evidence regarding the plea withdrawal motion and again denied the request. A second appeal ensued. The order denying the plea withdrawal motion was upheld.

REASON FOR GRANTING THE PETITION

The Opinion below fails to grasp the importance of liberally interpreting Federal Rule of Civil Procedure 32(d) when the request to withdraw a previous plea of guilty is made before sentencing. As Justice Stewart so eloquently stated in his concurrent Opinion in *Dukes v. Warden*, 406 U.S. 250 (1972), "Before Judgment, the courts should show solicitude for a Defendant who wishes to undo a waiver of all constitutional rights that surround the right to trial—perhaps the most devasting waiver possible under our Constitution."

The lower court had ample evidence that the defendant's state of mind at the time of his change of plea was sufficient to create a reasonable doubt as to his voluntariness and therefore the plea could not have been an intelligent waiver or intentional relinquishment of constitutional rights. The decision by the United States Court of

Appeals and the lower court, conflicts with applicable decisions of this Honorable Court.

Petitioner (Mr. Rivera-Martínez) had been evaluated by two (2) psychiatrists who offered their testimony at the Plea withdrawal Reconsideration Hearing which became in itself a competency determination upon the Circuit Court's remand for resentencing. After ample testimony the Lower Court decided again that it would not allow petitioner to withdraw his guilty plea.

The first witness who testified at the June 26, 1990 hearing was Dr. Fernándo J. Cabrera (Dr. Cabrera) who is a qualified psychiatrist used by the U.S. Attorneys Office and the District Court in Puerto Rico on many mental competency issues. Dr. Cabrera testified that he himself practiced an examination on petitioner on April 2nd and May 9th of 1990 and that a psychologist who works for Dr. Cabrera evaluated petitioner on April 2nd, April 3rd and April 4th.

Dr. Cabrera, government witness, testified as to the evaluation he performed of Mr. Rivera-Martínez at the State Penitentiary (App. 1(c)). He identified from his record (Sentencing Trans. p. 19) that the defendant was taking a series of pills which he identified as Percoset (analgesic), Catapres (for high blood pressure), Halcyon (benzodiazepine), Xanax (benzodiazepine), Tranxene (benzodiazepine), Valium (benzodiazepine), Restoril (benzodiazepine), and Sinequan (antidepressant), all of which are schedule IV controlled substances. (Sentencing Trans., pp. 7-27). Additionally, there was testimony that the defendant had informed Dr. Cabrera that he had also taken Dalmane which is another Benzodiazepine and Hytrin, which is an antihypertensive. This was later corroborated by the testimony of Dr. Jorge Prieto Rodríguez, the prescribing physician. (Sentencing Trans., pp. 45 and 57).

Dr. Cabrera established that the record reflects all these medications were being prescribed at the same time

and specifically during the time of his change of plea hearing. He also established that the medications that were being provided to Mr. Rivera Martínez have been found to affect the thinking and decision making process, produce confusion, retard the thinking process and induce a faster sleep. (Sentencing Trans., p. 16-22).

Dr. Cabrera testified that normal prescription procedures recognized by the medical profession do not favor prescribing multiple Benzodiazepines. Specifically, the American Psychiatric Association does not favor such a practice. Dr. Cabrera could not explain why someone would prescribe so much medication of the same type to one person knowing that it would affect the thinking process of that person. (Sentencing Trans., p. 24-27). Additionally, he testified that when prescribing analgesics and anxiolytics there must be very careful monitoring of the patient because each of these medications increases the effect of the other. Not only this, but benzodiazepines are contraindicated for patients with history of drug abuse as in the case at bar. They are also contraindicated, or at least should be prescribed with extreme monitoring to patients with heart conditions also as in the case at bar. Not only do Benzodiazepines depress the central nervous system but also Mr. Rivera-Martínez was being given a antidepressant (Sinequan) for depression which is a mood disorder. (Sentencing Trans., p. 28). This is hardly the requisite state of mind of a person who is renouncing all his constitutional rights prior to trial.

Dr. Cabrera performed a psychiatric evaluation of Mr. Rivera-Martínez based on the lower court's Order requesting it. He concluded that in his "personal opinion [that] we have to prepare a course for the doctors in how to prescribe Benzodiazepines, as he (referring to the defendant Rivera-Martínez) was taking several Benzodiazepines prior to his trial and this medication have (sic) accumulative and anticholinergic effects; . . .".

(App. C, *infra*, p. 37a). Dr. Cabrera testified during the hearing that:

> . . . of course I would not prescribe, not recommend any physician to prescribe more than one Benzodiazepine as a hypnotic, and I would not recommend any doctor to prescribe one Benzodiazepine as mild tranquilizer or anti-anxiety and one for a sleeping pill.
>
> Also, I would not recommend any physician it is not usual practice, who has a history of drug addition, to have Benzodiazepine, because It would be converting medically, my responsibility in changing the drug addiction from heroin or cocaine or any other drugs, to Benzodiazepine. (Sentencing Trans., p. 33).

However, it should be noted that Mr. Rivera-Martínez was taking six (6) different Benzodiazepines at the time of his change of plea and four (4) hypnotics.

The second Government witness was Dr. Jorge Prieto Rodríguez (Dr. Prieto), who is a physician under contract with the U.S. Marshals Service for the last eight (8) or nine (9) years. (Sentencing Trans. at p. 42). Dr. Prieto is in charge of the medical treatment for all U.S. Federal Pre-Trial Detainees held in Puerto Rico. Dr. Prieto confirmed that he was in fact prescribing petitioner with all the medication to which Dr. Cabrera had referred to in his testimony. (Sentencing Trans., at pp. 45-47). More specifically Dr. Prieto admitted that on the date of the change of plea he was prescribing all those prescription drugs to Mr. Rivera-Martínez. (Sentencing Trans., at p. 51).

Dr. Agustín García (Dr. García) testified on behalf of the defendant. Dr. García is a Clinical Psychologist since 1962. Dr. García also prepared an evaluation (App. D, *infra*, p. 39a) and testified in reference to petitioner that "at the moment he changed his plea, most probably he was not aware of the consequences nor was he able to

defend himself nor to assist in his own defense." (Sentencing Trans., at p. 68). Dr. García further testified that in 28 years as a psychologist he had never seen a person being prescribed six (6) Benzodiazepines and four (4) hypnotics at the same time. Additionally, he testified that based on his experience and understanding, it would be very difficult for a person to take such medications and be able to think clearly, to draw conclusions and to have sound judgment. Also, the fact Mr. Rivera-Martínez was kept in isolation, seems to have no logical reason at all, except to put pressure on the person. (Sentencing Trans., at pp. 69-70). All these medications would create changes in the person's way of perceiving himself. (Trial Trans., at p. 70). It would seem that the fact that Mr. Rivera-Martínez was put in isolation and all the medications he was given had a final purpose of inducing self pity so that he would plead guilty of the charges against him. The scheme, worked. Dr. García testified that in his evaluation of Mr. Rivera-Martínez he was informed that Dr. Prieto had pressured him into pleading guilty. (Sentencing Trans., at p. 78).

Mr. Rivera-Martínez himself testified that he had in fact taken all the prescribed medications and that after grounding them and sniffing them all through his nose he came to the courtroom and told the Trial Attorney for the Government, Mr. Guillermo Gil, that he wanted to plead guilty without even consulting with his attorney. (Sentencing Trans., at p. 84). He testified that Dr. Prieto tried to induce him into cooperating with the Government while prescribing all the drugs. (Sentencing Trans., at p. 86). He testified that he didn't want to plead guilty because he was not guilty but he sniffed all the pills and went to the courtroom to plead guilty. (Sentencing Trans., at pp. 83-84).

Federal Rule of Civil Procedure 32(d) allows for the withdrawal of a previous plea of guilty. Federal courts have liberally interpreted this rule when the request is

made before sentence. *United States Ex-Rel. Culbreath v. Rundle*, 466 F.2d 730, 732 (3rd Cir. 1972). As Justice Stewart so eloquently stated in his concurrent opinion in *Dukes v. Warden*, 406 U.S. 250, 258, 92 S.Ct. 1551, 1555, 32 L.Ed. 2d 45 (1972):

> If a Defendant moves to withdraw a plea of guilty before judgment and if he states a reason for doing so, I think that he need not shoulder a further burden of proving the "merit" of his reason at that time. Before judgment, the courts should show solicitude for a Defendant who wishes to undo a waiver of all constitutional rights that surround the right to trial—*perhaps the most devastating waiver possible under our Constitution.* Any requirement that a Defendant prove the "merit" of his reason for undoing this waiver would confuse the obvious difference between withdrawal of a guilty plea before the government has relied on the plea to its disadvantage, and a later challenge to such a plea, on appeal or collaterally, when the judgment is final and the government clearly has relied on the plea. (Emphasis supplied).

If it is established, as it de facto seems to be, that petitioner had consumed all the medication Dr. Prieto prescribed and that it affected his mental and emotional state at the time of his change of plea then, in all conscience, the change of plea can hardly be construed as a voluntary, knowing and intelligent waiver of constitutional rights nor an intentional relinquishment or abandonment of a non-right or privilege. *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1170-71, 72 L.Ed. 2d 418 (1969) as followed in *U.S. v. Buckley*, 847 F.2d 991, 999 (1st Cir. 1988).

The fact that defendant Rivera-Martínez plead guilty without negotiating any type of plea agreement on his behalf is a clear sign of his state of mind at the time of his change of plea.

In *Culbreath, supra*, the Third Circuit Court of Appeals, reiterated its previous holdings in this respect, as

found in *United States v. Stayton*, 408 F.2d 559 (3rd Cir. 1969), and *United States v. Young*, 424 F.2d 1276 (3rd Cir. 1970). In fact, the Court in *Culbreath, supra*, 466 F.2d at 732, n.4, cited Judge Adams reasoning in *Young, supra*:

> The liberal rule for withdrawal of a guilty plea before sentences is consistent with the efficient administration of criminal justice. It reduces the number of appeals contesting the "knowing" and "voluntariness" of a guilty plea, and avoids the difficulties of disentangling such claims. It also ensures that a defendant is not denied a right to trial by jury unless he clearly waives it. p. 1279. See *ABA Project on Minimum Standards for Criminal Justice, "Standards Relating to Pleas of Guilty"*, (Approved Draft 1968).

It is precisely this concern with the accused's waiver of his or her right to jury trial, which has prompted the courts to favor these withdrawals. As a matter of fact, "the entry of a plea of guilty . . . has been described as perhaps the most devastating waiver possible under our Constitution." *United States v. I. H. Hammerman II*, 528 F.2d 326, 332 (4th Cir. 1975) citing *Dukes v. Warden, supra* (Stewart, J., concurring), and also relying on *Barlett v. United States*, 354 F.2d 745, 749 (8th Cir.), *cert. denied*, 384 U.S. 945, 86 S.Ct., 1471, 6 L.Ed. 2d 542 (1966).

Moreover, it has been held that the right to withdraw a plea of guilty must be read in reference to the surrounding circumstances, and certainly not in a vacuum. *United States v. Vallejo*, 476 F.2d 667, 669 (3rd Cir. 1973) relying in *United States v. Stayton, supra*, 408 F.2d at 561, and *United States Ex. Rel. Culbreath v. Rundle, supra*, 466 F.2d 730.

The U.S. Court of Appeals for the First Circuit has consistently held that:

> [2, 3] The standard guiding the trial court in deciding a motion to withdraw a plea of guilty before sentence is simply whether or not a "fair and just" reason has been advanced, see *Kercheval v. United States*, 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L.Ed. 1009, 1012 (1927). It should be liberally allowed. The standard guiding the reviewing court is whether the district court has abused its discretion, see e.g., *United States v. Barker*, 514 F.2d 208, 220 (D.C. Cir. 1975) as to which an appellant carries the burden. *United States v. Webster*, 468 F.2d 769 (9th Cir. 1972); *United States v. Lombardozzi*, 436 F.2d 878 (2d Cir. 1971). *Nuñez Cordero v. United States*, 533 F.2d 723, 725 (1st Cir. 1976).

From the Appeal Court's Opinion in *United States v. Pellerito*, *supra*, at 1542, it would seem that this Court accepts that Mr. Rivera-Martínez complied with the requirements of Federal Rule of Civil Procedure 32(d) but that the questions as to whether this was sufficient to vitiate the plea was left in irons since there was "no corroboration as to the claimed effect of the medication on the voluntariness" of the change of plea as specifically found by the Lower Court. *Rivera-Martínez*, 693 F.Supp. 1358, 1364 (D.P.R. 1988). However, based on the testimony of doctors Cabrera, Prieto and García, during the Plea Withdrawal Reconsideration Hearing, the involuntariness argument originally raised by petitioner on Appeal (App. 15(a)) now has enough headway to meet the "fair and just reason" impact, and more specifically the effect on voluntariness which the Lower Court has refused to accept even with ample testimony.

The Change of Plea Hearing in itself reflects that certain matters which occurred, such as Rivera-Martínez' addressing the U.S. Government Trial Attorney directly to change his plea without consulting or even informing his attorney (Sentencing Trans., p. 97; the fact that he would answer the Court's questions during the Change of Plea Hearing even before they had been completely

posted, and that the U.S. Trial Attorney had to alert the Lower Court (change of Plea Hearing Transcript p. 9); the fact that he could not concentrate on what he was being asked by the Court at the hearing (change of Plea Hearing Transcript p. 21, 26, 32-34); the fact that his legal representative at the time attempted to answer for Mr. Rivera-Martínez (change of Plea Hearing Transcript p. 43), in addition to all the new testimony, and the fact that he requested leave to withdraw his change of plea before sentencing would certainly warrant that he be granted his constitutional right to a fair trial by jury.

CONCLUSION

The petition for a Writ of Certiorari should be granted to foster the efficient administration of justice by dispelling the notion that lower courts may refuse to interpret liberally Federal Rule of Criminal Procedure 32(d) and therefore refuse to allow defendants who wish to undo a waiver of their constitutional rights before sentencing, such a right.

Respectfully submitted,

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July 24, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-2068

UNITED STATES OF AMERICA,
Appellee,

v.

GIUSEPPE PELLERITO,
a/k/a JOSEPH EL ITALIANO,
Defendant, Appellant.

No. 88-2091

UNITED STATES OF AMERICA,
Appellee,

v.

HECTOR RIVERA-MARTINEZ,
a/k/a EL MEN.

Appeals from the United States District Court
for the District of Puerto Rico
[Hon. Jose Antonio Fuste, *U.S. District Judge*]

Before
Campbell, *Chief Judge,*
Breyer and Selya, *Circuit Judges*

Frank A. Rubino with whom *Mark Anthony Cristini* was on brief for appellant Giuseppe Pellerito.

Carlos Lopez De Azua for appellant Hector Rivera-Martinez.

Everett M. de Jesus, Assistant United States Attorney, Department of Justice, with whom *Daniel F. Lopez-Romo*, United States Attorney, was on briefs for the United States.

JUNE 30, 1989

SELYA, *Circuit Judge*. Some three dozen individuals, including appellants Hector Rivera-Martinez and Giuseppe Pellerito, were charged in a multi-count indictment as members of a huge drug ring allegedly headed by Rivera-Martinez. As trial approached, the district court entertained a steady stream of guilty pleas from various defendants. Trial began on June 6, 1988 and ended abruptly when the remaining defendants admitted their culpability. Appellants were among the last holdouts: Pellerito pled guilty to the sole count in which he was charged on June 7 and Rivera-Martinez pled to four counts the next day.[1]

The jury was discharged and the trial dismantled, but the matter was far from finished. Prior to sentencing, appellants filed motions seeking to withdraw their pleas. The district court held separate evidentiary hearings and denied each motion by written opinion. *United States* v. *Pellerito*, 701 F. Supp. 279 (D.P.R. 1988); *United States* v. *Rivera-Martinez*, 693 F. Supp. 1358 (D.P.R. 1988). The court also denied certain further motions filed by

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[1] Although Rivera-Martinez was charged in a total of seven counts, the government dismissed three of them.

Rivera-Martinez. Defendants' ensuing appeals were consolidated for briefing and argument.

We begin our analysis by rehearing certain legal principles applicable to both appeals. Then, we discuss separately the defendants' reasons for plea withdrawal and the lower court's rulings. Finally, we deal with the denial of Rivera-Martinez's last round of motions.

I. APPLICABLE LAW

The plea-withdrawal test, the yardstick for measuring claims of ineffective legal assistance, and the standard of appellate review are relevant to both of these appeals. We summarize the applicable law.

A. *Plea Withdrawal.*

Having chosen to plead guilty, a defendant possesses no absolute right to retract his plea. *See United States* v. *Buckley*, 847 F.2d 991, 998 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 808 (1989); *United States* v. *Kobrosky*, 711 F.2d 449, 454 (1st Cir. 1983). When he tries to do so, the rule of decision depends upon the timing of the attempt. When, as here, a defendant asks to annul his plea prior to sentencing, the court should permit withdrawal if there is a "fair and just reason" for doing so. Fed. R. Crim. P. 32(d); *Buckley*, 847 F.2d at 998; *Kobrosky*, 711 F.2d at 454. In determining whether a fair and just reason has been proffered, a number of factors figure in the equation, including (1) the force and plausibility of the reason; (2) the timing of defendant's change of heart; (3) whether defendant has asserted his legal innocence; (4) whether the parties had reached (or breached) a plea bargain; and (5) most importantly, whether the defendant's guilty plea can, in light of the proffered reason and the disclosed circumstances, still be regarded as voluntary, intelligent, and otherwise in conformity with Fed. R. Crim. P. 11. *See generally Buck-*

ley, 847 F.2d at 999; *United States* v. *Daniels*, 821 F.2d 76, 79-80 (1st Cir. 1987); *United States* v. *Ramos*, 810 F.2d 308, 312-13 (1st Cir. 1987); *Kobrosky*, 711 F.2d at 455. If a defendant advances a plausible reason, the court should also weigh the prejudice, if any, to the government. *Ramos*, 810 F.2d at 313; *Kobrosky*, 711 F.2d at 455.

B. *Ineffective Assistance.*

In this case, both appellants—albeit on different facts—charge that deficient legal representation contributed to their "mistaken" guilty pleas. Even prior to sentencing, defendants who maintain such a position must meet the accepted tests for ineffective assistance before being allowed to withdraw pleas on this basis. *Ramos*, 810 F.2d at 314. Specifically, a defendant must demonstrate both that counsel's representation "fell below an objective level of reasonableness," and that cognizable prejudice flowed therefrom, *i.e.*, that he "would not have pleaded guilty and would have insisted on going to trial" if not for counsel's shortcomings. *Hill* v. *Lockhart*, 474 U.S. 52, 57-59 (1985). *See also Strickland* v. *Washington*, 466 U.S. 668, 687 (1984).

C. *Appellate Review.*

In cases of this genre, courts of appeals should accord district courts' decisionmaking considerable respect. Confronted with an attempt at plea retraction, the trial judge must make an idiocratic, particularistic, factbound assessment—an assessment which is facilitated because the judge has overseen pretrial proceedings, conducted the Rule 11 inquiries, accepted the original guilty plea, and heard at first hand the reasons bearing upon its withdrawal. Appellate courts, being less directly familiar with the circumstances and lacking the district judge's "feel" for the case, ought ordinarily to defer to the decision reached on the front lines. It follows that, other than for errors of law, we will disturb the trial judge's

refusal to allow plea withdrawals only for demonstrable abuse of discretion. *See Buckley*, 847 F.2d at 998; *Kobrosky*, 711 F.2d at 454; *see generally Independent Oil & Chemical Workers* v. *Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988) (describing test for abuse of judicial discretion); *United States* v. *Hastings*, 847 F.2d 920, 924 (1st Cir.) (same), *cert. denied*, 109 S. Ct. 308 (1988). The trial court's subsidiary factfinding in connection with plea-withdrawal motions can be set aside only for clear error. As in kindred contexts, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985).

With this short prelude, we turn to the first of the appeals.

II. PELLERITO'S REASONS

The district court concluded that Pellerito's guilty plea was fully informed and competently made; that his claims of ineffective assistance were meritless; and consequently, that he had failed to evince a fair and just reason for retraction. *See Pellerito*, 701 F. Supp. at 296. We treat independently with two issues which appellant hawks with especial fervor, and then assay the balance of relevant situational factors.

A. *The "Misunderstood" Plea Bargain.*

Pellerito claims that his trial attorney, Emanuel Moore, led him to believe that, as part of the plea agreement, he would receive immunity from threatened prosecutions in New York and Florida. He contends alternatively that, for whatever reason, he thought (erroneously) that further prosecutions in other jurisdictions would be barred,

thus rendering his guilty plea involuntary.[2] The district court found defendant's claim that Moore misled him to be "not credible." *Id.* at 294. Among other things, the court pointed to testimony by Pellerito's local counsel, attorney Julio Morales-Sanchez, that it had been explained to Pellerito "that the plea agreement was not binding on other jurisdictions." *Id.* The decision to believe Morales-Sanchez on this point, rather than appellant, was the trial judge's to make and should not be disturbed.

Defendant's professed belief that, regardless of what he was told, he would be held harmless from prosecutions in other jurisdictions, is material only to the extent it was objectively reasonable. *United States* v. *Hogan*, 862 F.2d 386, 388 (1st Cir. 1988). Here, it was not. First, Pellerito had ample incentive to plead wholly apart from fear of mushrooming prosecutions. Because the Drug Abuse Act of 1986, 21 U.S.C. § 960, did not apply to the plea as structured, and the plea agreement obligated the prosecutor to recommend a maximum sentence of 18 years (a recommendation that the trial court followed), appellant's potential exposure was lowered materially.[3]

Second, during the change-of-plea hearing, defendant assured the district judge that no other promises had been made, no other terms negotiated. There was no suggestion that immunity from prosecution elsewhere had been considered, let alone guaranteed. As the court below perspicaciously observed, "it strains credibility to suggest that [defendant's supposed] misconception as to the grant of immunity would not have come to light" in the lengthy, detailed Rule 11 colloquy. *Pellerito*, 701 F. Supp. at 295.

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[2] We note in passing that Pellerito's claims embody a hypothetical element. To date, there is no suggestion that charges have been brought against Pellerito elsewhere, and when queried at oral argument, his appellate counsel would identify none.

[3] For a fuller explication of this point, *see Pellerito*, 701 F. Supp. at 289-90.

We will not permit a defendant to turn his back on his own representations to the court merely because it would suit his convenience to do so.

It is true that, at one point during the Rule 11 proceedings, defendant stated that he was pleading to "conspiracy enterprise in Puerto Rico, New York, New Jersey and Florida." Counsel seizes upon this single locution and claims it proves that Pellerito believed his plea was intended to foreclose prosecution in other venues. It is possible that such an inference might be drawn from Pellerito's response—but it is certainly not the only permissible inference, nor even the most plausible one. The defendant was pleading guilty to participation in a multistate conspiracy. He could simply have been describing the places where, in his view, the drug-trafficking combine operated. At any rate, we are reluctant to place the weight of decision on an isolated reference in a long and thorough Rule 11 inquiry, in the process overruling the contrary determination of the judge who presided at both the plea-tendering and plea-withdrawal hearings, and who saw and heard the principals. Having read the entire record, we believe there was ample support for the district court's finding that defendant's claimed failure to understand the terms of his plea agreement was imaginary rather than real.[4] *Pellerito*, 701 F. Supp. at 295.

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[4] Counsel's suggestion, contained in appellant's brief and repeated at oral argument, that Pellerito had a "language problem" and was "fumbling" in his efforts to speak and comprehend English, borders on the unprofessional. The district judge commented upon Pellerito's fluent use of English in court and in recorded conversations, elicited from several witnesses testimony that Pellerito spoke English competently, and took a series of prophylactic measures designed to level any possible language barrier. Indeed, the court's solicitude and concern were sufficiently marked that, at the plea-withdrawal hearing, appellant's present counsel set the matter to rest, stating:

> Nowhere in my motion do I raise a language issue. And I will be happy to say [to] this Court and any appellate court, lan-

B. *Ineffective Assistance.*

Pellerito shuttled lawyers in and out as he readied his defense. He was represented initially by attorney Segal, then by attorneys Fisher and Bronson, then by attorney Moore, and finally by his present counsel. He was also represented by local counsel in the person of Morales-Sanchez, a former United States Attorney. At the time of the plea-withdrawal hearing, Pellerito asserted that the majority of these lawyers represented him inexpertly. Most of these claims were so conclusively resolved by the district court, *e.g.*, *id.* at 291-92 (discussing allegedly ineffective assistance of Messrs. Fisher, Bronson, and Morales-Sanchez) that adding an appellate gloss would be carrying coals to Newcastle. In our view, only two aspects of the jeremiad warrant further comment.

1. *The Tapes.* Telephone interceptions formed a centerpiece of the prosecution's case against many of the defendants, Pellerito included. Appellant now says that his attorneys should have tried to suppress the tape recordings commemorating these conversations. The argument, tonitruously phrased in emphatic terms, contains abundant sound and fury, but signifies precious little. In the first place, Pellerito has shown no prejudice attributable to the absence of a suppression motion. Although present counsel, in a rote recital, lists numerous ways in which the fruits of electronic surveillance can be challenged, he offers not a scintilla of evidence to indicate that the particular tapes which incriminated Pellerito were vulnerable in any respect.

In the second place, reality debunks the suggestion. The record on appeal does not reflect that any of the

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guage is not, and I repeat, N-O-T, the issue we are here about today.

Counsel may have forgotten his vow, but we are mindful of it. We reject this argument summarily, reminding the attorney that this court does, and we repeat, D-O-E-S, read the record on appeal.

other defendants in this thirty-five defenadnt case were successful in quashing the telephone intercepts. Attorney Fisher testified that he and his staff expended enormous time and effort searching for a plausible way to block the tapes (and the damning evidence they contained). Fisher ultimately concluded that there was no "legitimate shot" at achieving suppression. The district court credited this evidence. *Pellerito*, 701 F. Supp. at 287. It was entitled to do so. Fisher's decision not to seek suppression was reasonable. "Effectiveness" does not require that counsel jump through every conceivable hoop, or engage in futile exercises. *See United States* v. *Cronic*, 466 U.S. 648, 656 n.19 (1984) ("useless charade" not required); *United States* v. *Levy*, 870 F.2d 37, 38 (1st Cir. 1989) (counsel need not advocate "meritless defense") (citing *Cronic*). That another lawyer might have taken a different slant is beside the point; as the Court has taught, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" in ineffective assistance litigation. *Strickland*, 466 U.S. at 690.

2. *Preparation Time.* Pellerito also asserted that Moore, his trial counsel, did not have adequate time to prepare a solid defense. Pellerito discharged Fisher and hired Moore on Thursday, June 2, knowing that trial was scheduled to start on June 6. The district court found that, notwithstanding his late entry into the case, Moore was ready for trial. *Pellerito*, 701 F. Supp. at 292-93. The finding, we think, is sustainable.

Moore had been an attorney for 22 years, specializing for much of that time in criminal defense. Earlier in his career, he had been both a federal and state prosecutor. He had tried hundreds of matters. And, he was a stranger neither to the client nor to the cause: Moore had known Pellerito for six years and was familiar with many details of the case by reason of his association with

Mario Malerba, a codefendant's lawyer. In addition, Moore had, and diligently utilized, many resources. Attorney Gonzalez, an associate, worked with him. Fisher, Bronson, Malerba, and Morales-Sanchez made themselves available and briefed Moore on various aspects of the case. Bronson and Fisher provided all the discovery material obtained from the government (including transcripts of the taped telephone calls). The district judge allowed Moore, Pellerito, Malerba, and Morales-Sanchez to listen to the tapes before trial began.

Certainly, available preparation time was in relatively short supply and the timing less than ideal. Yet Moore, at least, harbored no doubt that by Monday he was fully prepared. He testified:

> I came ready to go to trial. There was no doubt about that. . . . I felt very comfortable with going to trial on that day.

When a trial date has been set, a defendant who elects to change counsel at the eleventh hour is deemed to be aware of the need for, and rigors of, proper preparation. Counsel who chooses to accept the engagement is equally on notice. Lawyers with different backgrounds, work habits, experience, and skill require differing amounts of time properly to ready a case for trial. In this instance, Moore appears to have responded to the exigencies of the moment in a thoroughly professional manner. Particularly given the lawyer's long experience and unquestioned expertise in criminal law, the district court was entitled to conclude that Moore's trial preparation, though pressured, fell comfortably within the boundaries of reasonably effective representation. *See Strickland*, 466 U.S. at 687; *see also Cronic*, 466 U.S. at 665-66 (absent showing of some specific error, ineffective assistance cannot be presumed from, *inter alia*, brevity of preparation period).

C. *Calibrating the Scales.*

Having determined that Pellerito's principal points lack merit, review of the district court's handling of relevant situational factors need not detain us long. The opinion below is a model of the careful, balanced inquiry that plea-withdrawal attempts demand: it limns the circumstances of the plea; fully addresses defendant's arguments; sets out explicit findings of fact; and meticulously documents those findings. We endorse the findings and conclusions unreservedly.

In Pellerito's case, when the record is read fully and in context, the scales tip markedly in the prosecution's favor. For one thing, Pellerito never asserted that he was innocent of the charges to which he pled. For another thing, even though one of his current lawyers was present at the Rule 11 hearing, he did not move for withdrawal until approximately eight weeks had elapsed. The prosecution, laboriously assembled over time, was by then dismantled. Third, the plea was part of a *quid pro quo*, explicitly articulated and fully achieved. In light of the totality of the circumstances, including the facts to which we have referred, the district court cannot be said to have misused its discretion in concluding that Pellerito's plea was voluntary, sentient, and intelligently given, and in discerning no fair and just reason for retraction.

III. RIVERA-MARTINEZ'S REASONS

Rivera-Martinez also advances a host of grounds for granting his plea-withdrawal motion. Mindful of the district court's detailed discussion of the matter, *Rivera-Martinez*, 693 F. Supp. at 1363-65, we can be correspondingly brief. We nevertheless consider each of the three main pillars upon which assigned error rests, as well as scrutinizing the district court's balancing of relevant factors.

A. *Family Pressure.*

Rivera-Martinez contends that his change of plea was the product of "duress" in that he was "coerced by the stressful situation" to plead guilty. Specifically, defendant claims to have tendered his plea while in an agitated emotional state brought on by telephone conversations with his hospitalized mother (who was also under indictment). Defendant says that he yielded to his mother's urging, and calls attention to his statement during the Rule 11 hearing that his "family has suffered too much."

Rivera-Martinez misperceives the focus of the plea-retraction inquiry: while evidence of this stripe is probative of an accused's *motivation* for pleading guilty, it does not necessarily show coercion, duress, or involuntariness. Criminal prosecutions are stressful experiences for nearly all concerned—particularly defendants and their families. It is to be expected that feelings will run strong within a family unit and that loved ones will advise, counsel, implore, beseech, and exhort defendants to take—or abjure—myriad courses of action. The relevant question for plea withdrawal is not whether the accused was sensitive to external considerations—many defendants are—but instead whether the decision to plead was voluntary, *i.e.*, a product of free will. *See Ramos*, 810 F.2d at 314; *see also Buckley*, 847 F.2d at 1000 n.6 (threat that brother otherwise might be indicted "did not make [defendant's] plea involuntary as a matter of law"); *Wojtowicz* v. *United States*, 550 F.2d 786, 792 (2d Cir.) (rejecting intra-familial "coercion" as basis for plea retraction), *cert. denied*, 431 U.S. 972 (1977).

In this case, the district court found that defendant's plea was not the product of coercive or debilitating emotional strain. *Rivera-Martinez*, 693 F. Supp. at 1364. That finding derives abundant record support. The Rule 11 inquiry was searching, a circumstance of some impor-

tance. *See Buckley*, 847 F.2d at 999 (thorough dialogue with defendant at Rule 11 hearing bolsters district court's findings); *Ramos*, 810 F.2d at 312 (similar). The likelihood that the change of plea was studied, rather than the product of an emotional outburst, is strengthened by a medley of other circumstances: defendant has not claimed to be innocent of the charges to which he pled guilty; he waited a full seven weeks before moving to withdraw his guilty plea; he precluded no evidence of distraction apart from his naked assertion; and his responses during the Rule 11 hearing, in the aggregate, demonstrate a grasp of the issues and a high probability that the plea was volitional and considered. *See United States* v. *Crosby*, 714 F.2d 185, 192 (1st Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984).

B. *Prescription Drugs.*

When Rivera-Martinez pled guilty, the district court asked whether he had taken any medication that might impair his ability to understand the proceedings. Defendant replied in the negative. He did not tell the judge that while in prison awaiting trial he had been taking an extensive regimen of prescription drugs. According to defendant's physician, these were for the most part sedatives and anti-anxiety agents. Rivera-Martinez disclosed the truth at the plea-withdrawal hearing, asking to be relieved of his plea because of this circumstance. Finding "no corroboration as to the claimed effect of the medication on the voluntariness" of the plea, the district court rejected the request. *Rivera-Martinez*, 693 F. Supp. at 1364. There was no error.

The mere fact that Rivera-Martinez took potentially mood-altering medication is not sufficient to vitiate his plea. There must be some evidence that the medication affected his rationality. *See Buckley*, 847 F.2d at 999-1000; *United States* v. *Benavides*, 793 F.2d 612, 617 (5th Cir.), *cert. denied*, 479 U.S. 868 (1986); *see also*

United States v. *Press*, 384 F.2d 955, 956 & n.3 (3d Cir. 1967) (per curiam) (denial of plea-retraction motion upheld because defendant produced no evidence confirming that he suffered claimed "fit of depression"). Here, the only medical evidence—the testimony of the treating physician, Dr. Prieto—conclusively refuted defendant's theorem, making manifest that the medications had no effect on Rivera-Martinez's alertness or powers of concentration. Consideration that Dr. Prieto treated defendant frequently, saw him on the day of the guilty plea, and testified that he seemed "competent" and "sure of what he was saying" at the time, the court below was amply justified in determining that the medicine worked no impairment of defendant's cognitive processes.[5]

C. *Ineffective Assistance.*

Defendant argues vociferously that one of his attorneys, Carlos Noriega, was ineffectual. He claims, among other things, that Noriega led him down a primrose path, lulling him into a false sense of security while doing nothing to arm his defense. Rivera-Martinez also complains that Noriega failed to follow instructions. These accusations reduce to a swearing match: Noriega testified at the plea-withdrawal hearing, specifically addressing and firmly rebutting each charge. The district court, we think, was entitled to believe the lawyer rather than the client.

Noriega, a veteran practitioner and criminal-law professor, said that he spent more than 200 hours reviewing the evidence. His trial preparation, as he described it,

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[5] The district court's finding was likewise supported by Noriega's testimony that his client was competent to plead, and by the judge's personal recollection that the defendant "was alert and oriented, and participated in the [Rule 11] proceedings . . . in a manner similar to his behavior observed at the recent withdrawal hearing." *Rivera-Martinez*, 693 F. Supp. at 1364. Although perhaps supererogatory, we list these items for the sake of completeness.

touched all the customary bases. To be sure, Noriega's narrative leaves little question but that he had a difficult client. Rivera-Martinez frequently made requests that were extraordinary, irregular, or impossible to fulfill. But, a defendant is entitled to the lawyerly exercise of reasonable skill and diligence—not to a unquestioning slave in a three-piece suit who will do whatever the client bids, no matter how farfetched. Here, we see no indication that Noriega failed to take any action fairly necessitated by the demands of the case. We have searched the record as to each incident of which appellant complains. Most of the complaints are little more than carping born of the disappointment understandably attendant to a stiff, though lawful, sentence. We need not review specific remonstrances in any detail.[6] Suffice it to say that appellant has not established that these incidents, or any other action or inaction on Noriega's part, taken singly or collectively, materially prejudiced the defense.

Rivera-Martinez also assails Noriega's pretrial "assurances" that the defense would prevail. Noriega testified that he made no such representations, branding Rivera-Martinez's account "absolutely false." Rivera-Martinez himself, during the Rule 11 colloquy, assured the court that he was satisfied with Noriega's work on his behalf—an improbable response for someone who, as he would now have it, had been "demoralized" by counsel's egregious shortcomings. When an accused seeks to withdraw a guilty plea, the court is not obliged to treat self-serving accounts as gospel. In this instance, the

[6] We mention but two examples. When Noriega was asked to locate an accountant who defendant professed could exculpate him, Noriega found that the accountant was a prosecution witness and the books which he kept for appellant had been seized by the government. When defendant instructed the lawyer to travel to New York in an effort to obtain evidence of Rivera-Martinez's treatment for drug addiction in 1968, Noriega declined. No funds were made available to defray the cost of the trip, and the evidentiary relevance of treatment so long ago was extremely dubious.

judge was well within his rights in refusing to accept defendant's recollection of the assurances given to him.

To cap the bottle, Rivera-Martinez's contention that Noriega euchred him into entering the guilty plea is so insubstantial as to make quicksand seem like granite. Noriega testified that his client had sought a plea bargain from the very beginning of the case. No agreement could be reached. Trial began. Rivera-Martinez, on his own initiative, decided at that time to plead guilty, without informing his lawyer (who first found out about the impending change of plea from a prosecutor). Although Noriega cautioned defendant that, absent a plea agreement, he would be "submitting [himself] to the mercy of the Court," Rivera-Martinez persisted in pleading guilty. The Rule 11 colloquy bears out Noreiga's version. When asked by the district judge if counsel has advised him to plead guilty, Rivera-Martinez responded: "I was the one who asked him to plead guilty." If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of "ineffectiveness" for which relief can be granted.

In fine, the record shows clearly that, facing a prosecution case so strong as to be overwhelming, and forced to cope with a cross-grained client, Noriega represented Rivera-Martinez as effectively as the circumstances would allow. Defendant's allegations to the contrary are altogether bootless.

D. *Calibrating the Scales.*

Once Rivera-Martinez's flagship assertions are set to rest, there is scant question as to the supportability of the result reached below. Virtually all the variables in the plea-withdrawal calculus cut against the defendant. We have already alluded to many of the pertinent factors, *e.g.*, lack of any plausible reason to justify retraction, absence of any assertion of innocence, delay in seeking relief. Nothing more need be added. The district

court's discussion is comprehensive, *see Rivera-Martinez*, 693 F. Supp. at 1363-65, and its determination that appellant advanced no fair and just reason for disclaiming his guilty plea is beyond reproof.

IV. THE LAST-DITCH MOTIONS

Rivera-Martinez has yet another string to his bow. After the district court refused to allow retraction of his guilty plea,[7] Rivera-Martinez filed a motion (Motion No. 1) requesting (a) psychiatric and psychological examinations, and (b) a competency hearing. The judge denied Motion No. 1, stating that there was "ample evidence . . . on the subject of competency," and "no reasonable cause to believe that the defendant is suffering from mental disease or a defect rendering him incapable to understand the nature and consequences of these proceedings." On September 9, defendant moved for reconsideration (Motion No. 2) and simultaneously filed a further motion (Motion No. 3) informing the court that he had retained Dr. Carol Romey, a clinical psychologist. Motion No. 3 requested that Dr. Romey be provided with Rivera-Martinez's medical records and permitted to conduct an evaluative interview.[8] Motions No. 2 and 3 were summarily denied.

A. *The Applicable Standards.*

Our consideration of these orders begins with 18 U.S.C. § 4241,[9] a statute designed to reflect the deeply-rooted

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[7] Initially, the court denied the plea-withdrawal motion in an *ore tenus* decision on August 18, 1988. The court filed its written opinion on September 2, fleshing out its earlier bench decision. Motion No. 1 was docketed on August 25, 1988.

[8] The judge's permission was necessary because, without a court order, prison officials would not allow the psychologist to interview Rivera-Martinez (who was then in custody).

[9] The statute provides in pertinent part:

> (a) *Motion to determine competency of defendant.*—At any time after the commencement of a prosecution for an offense

idea that a person "whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope* v. *Missouri*, 420 U.S. 162, 171 (1975). The need for competency survives trial and extends through the sentencing phase of a criminal proceeding. *See, e.g., Hall* v. *United States*, 410 F.2d 653, 658 & n.2 (4th Cir.) (incompetent defendant may not be "effectively present" at sentencing; passing sentence under such conditions might violate due process), *cert. denied*, 396 U.S. 970 (1969). As sentencing approaches and occurs, the defendant's best interest—and, indeed, the public interest—requires that he be capable of assisting his counsel and his cause. The Criminal Rules explicitly provide for a convicted defendant's continued participation in the adversary process, for example, through critical evaluation of the presentence investigation report, *see* Fed. R. Crim. P. 32(a)(1)(A), and allocution at time of sentencing, *see* Fed. R. Crim. P. 32(a)(1)(C). These activities are of considerable import. As Justice Frankfurter wrote anent allocution: "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for

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and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) *Psychiatric or psychological examination and report.*—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to [other provisions of the law]

18 U.S.C. § 4241.

himself." *Green* v. *United States*, 365 U.S. 301, 304 (1961) (plurality opinion). Surely, the sentencing process necessitates that the defendant possess both a "present ability to consult with [a] lawyer with a reasonable degree of rational understanding," and a "rational as well as factual understanding of the proceedings." *Dusky* v. *United States*, 362 U.S. 402, 402 (1960) (per curiam) (defining competence to stand trial).

Notwithstanding the salience of this principle, a trial judge is not required to grant every motion questioning an accused's competency. The governing statute operates on two levels: 18 U.S.C. § 4241(a) authorizes the court to hold evidentiary hearings in which competency may be fully explored, and section 4241(b) permits examinations to be undertaken. There is no *automatic* entitlement to a competency hearing at any stage; to invoke the anodyne of section 4241(a), a threshold showing must first be made. *See, e.g., Wojtowicz*, 550 F.2d at 790 (hearing necessary if defendant furnishes "sufficiently detailed and controverted factual allegations" which, if true, would indicate incompetency). Motions under section 4241(b) serve several purposes, one being to ascertain whether there is enough reason to warrant inquiry into the facts, that is, to justify holding an evidentiary hearing under section 4241(a). We believe that such exploratory motions should be allowed with some liberality.

When there has been no previous competency hearing, appellant courts should review denial of an examination request scrupulously in order to ensure that the defendant's rights are safeguarded. *See United States* v. *Johns*, 728 F.2d 953, 956 (7th Cir. 1984) ("when there has been no psychiatric examination or judicial determination, our review is comprehensive"); *see also United States* v. *Renfroe*, 825 F.2d 763, 766 (3d Cir. 1987) (similar). Where, as here, the defense has engaged a qualified expert and is willing and able to defray the expense, there will typically be little reason to deny an

initial request for psychiatric evaluation, if timely. After all, the public has a vital stake in assuring the even-handed availability of adequate procedural safeguards and thereby preventing incompetent persons from being held to the same standards as other criminal defendants. *See generally United States* v. *Auen*, 846 F.2d 872, 877 (2d Cir. 1988).

B. *Discussion.*

Applying these principles, we think it rather clear that the court below erred in denying Motion No. 3.[10] In essence, that motion requested only that defendant, at his own expense, be allowed to have a qualified psychologist conduct a mental examination. Given the timing, honoring the motion would have worked little discernible prejudice to either court or prosecution. Sentencing took place on October 11, 1988. There is no indication that Dr. Romey could not have performed her examination and filed her report prior thereto. Conversely, the defendant's interest was great. He was sentenced to life imprisonment and fined $100,000.

Then, too, the request seems to have been not entirely a shot in the dark. Defendant alleged in Motion No. 1 that he was a long-time drug abuser; that he had been treated previously for mental illness; and that one of his former attorneys had stated under oath that the "imbalance in [defendant's] personality" affected his cooperation with counsel. Rivera-Martinez's medicinal regimen was at that point a matter of record. *See supra* Part III(B). Under the circumstances, there was no sound basis for preventing appellant from pursuing further in-

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[10] We need not consider—and offer no opinion on—the propriety of the court's rulings on Motions No. 1 and 2. Because Motion No. 3 should have been allowed, and the error requires vacation of sentence and further proceedings below, *see infra*, any views which we might express as to the district court's rulings on the earlier motions would be solely of academic interest.

quiry on the subject of competency.[11] Motion No. 3 should have been granted.

To be sure, defendant cannot now revivify his plea-withdrawal motion. Rivera-Martinez previously raised the issue of competency to plead (vis-a-vis ingestion of prescription drugs), yet he made no request for either a competency determination or a mental examination while that motion was pending. Nor did he offer *psychiatric* testimony at the plea-withdrawal hearing, even though he bore the devoir of persuasion. Having opted to forgo such evidence as a basis for plea retraction, defendant is foreclosed from belatedly questioning competency at the time of the plea. *See Ramos*, 810 F.2d at 314 ("eleventh-hour" claim that depression affected voluntariness of defendant's plea was rejected without hearing when defendant's attorneys "did not raise any concern as to his competence until the motion to withdraw was filed").

Be that as it may, remand can still serve a purpose. The final round of motions did not address Rivera-Martinez's competency at the time he pled; rather, as Motion No. 1 spelled out in some detail, defendant argued the existence of "reasonable cause to believe that [he] . . . may be *presently* incompetent to understand the proceedings" (emphasis supplied). If defendant was incompetent at the time of sentencing, the proceedings should not have continued. *See Wojtowicz*, 550 F.2d at 790-91 (while defendant's allegations merited evidentiary hearing on competency at sentencing, he adduced no evidence warranting reopening issue of competency to plead).

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[11] Inexplicably, the government—which was of scant assistance to us on any issue in this case—chose to ignore the district court's rulings on the three competency-related motions. Its brief on appeal avoids the matter entirely. Lawyers who try to slide by with a lick and a promise, or who bury their heads in the sand and refuse to address issues squarely raised on appeal, cast their profession into disrepute. Such struthious conduct disserves both the appellate court and the client. When, as in this instance, the government is the client, the conduct also disserves the public interest.

We rule, therefore, that the district court erred in denying Motion No. 3. We consequently vacate defendant's sentence; remand so that Dr. Romey may conduct her evaluation; and direct the district court to convene a hearing if Dr. Romey's examination, together with the other facts of record, yields reasonable cause to question Rivera-Martinez's competency. The district court may proceed to resentence defendant only when and if the competency issue is resolved in the government's favor.

V. CONCLUSION

We need go no further. For the reasons stated, defendants' requests to retract their respective guilty pleas were altogether groundless.[12] Rivera-Martinez, however, was improperly prevented from litigating an issue anent his competency to sentenced. His sentence must, therefore, be annulled and the case remanded for further proceedings. Because of his great familiarity with the case, we direct that the district judge who originally presided keep the case on remand, at least for the purpose of supervising the further proceedings envisioned in this opinion. *See Anderson* v. *Cryovac, Inc.*, 862 F.2d 910, 933 (1st Cir. 1988).

In Appeal No. 88-2068, the order denying the plea-withdrawal motion is affirmed, as are the ensuing judgment and sentence.

In Appeal No. 88-2091, the order denying the plea-withdrawal motion is affirmed, the order denying Motion No. 3 is reversed, the sentence is vacated, and the cause is remanded for further proceedings in accordance with this opinion.

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[12] Both defendants took a shotgun approach to appeal. To the extent that we have failed to mention any specific pellets, it is because they fell so wide of any meaningful mark as not to deserve discussion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1746

UNITED STATES OF AMERICA,
Appellee,

v.

HECTOR RIVERA-MARTINEZ, a/k/a EL MEN,
Defendant, Appellant.

Appeal from the United States District Court
for the District of Puerto Rico
[Hon. Jose A. Fuste, *U.S. District Judge*]

Before
Torruella and Selya, *Circuit Judges,*
and
Boyle,* *District Judge.*

Jose A. Fuentes Agostini for appellant.

R. Montague Wilkinson, Attorney, Department of Justice, with whom *Robert S. Mueller, III*, Assistant Attorney General, *Charles S. Saphos*, Chief, Narcotic and Dan-

* The Honorable Francis J. Boyle, of the District of Rhode Island, sitting by designation.

gerous Drug Section, *Margaret A. Grove*, Attorney, Department of Justice, and *Daniel F. Lopez-Romo*, United States Attorney, were on brief for appellee.

April 26, 1991

SELYA, *Circuit Judge*. We are called upon today to revisit the tribulations of defendant-appellant Hector Rivera-Martinez following his guilty plea to four counts of what we once described as "a multi-count indictment . . . of a huge drug ring allegedly headed by Rivera-Martinez." *United States* v. *Pellerito*, 878 F.2d 1535, 1537 (1st Cir. 1989).[1] In our previous encounter with Rivera-Martinez's case, we affirmed the district court's refusal to allow him to withdraw his guilty plea, *id.* at 1542-43, but ruled that, as a prelude to sentencing, the court should have granted Rivera-Martinez's motion asking that, "at his own expense, [he] be allowed to have a qualified psychologist conduct a mental examination." *Id.* at 1545. Consequently, we vacated the defendant's sentence and remanded for further proceedings. *Id.* at 1546.

The defendant was subsequently examined by Dr. Cabrera, a psychiatrist, Dr. Garcia, a clinical psychologist, and Ms. Nieves, a psychologist. At a combined competency/sentencing hearing held in the district court on June 26, 1990, Drs. Cabrera and Garcia testified, as did Dr. Prieto, a physician under contract to the U.S. Marshal's Service,[2] and Rivera-Martinez himself. After hear-

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[1] Rivera-Martinez and Pellerito were codefendants. Their original appeals were consolidated for argument before us.

[2] Dr. Prieto, as the Service's contract physician, was responsible for the medical care of federal prisoners who, like Rivera-Martinez, were being detained at the Puerto Rico penitentiary. Dr. Prieto first saw Rivera-Martinez professionally sometime in 1987 and had

ing these witnesses, and considering the arguments of counsel, the court reaffirmed its earlier refusal to permit Rivera-Martinez to withdraw his plea; found him competent to be sentenced; and proceeded to impose the sentence described *infra*. This appeal followed.

Appellant assigns error in two respects: (1) that the court erred in refusing to allow him to retract his guilty plea, and (2) that the sentence imposed was impermissible under the Constitution. Although the first assigned error is not properly before us under the law of the case doctrine, we believe that the second assignment of error has partial merit.[3] Hence, we affirm the convictions and sentences on counts 1, 3 and 4, but vacate the conviction and sentence on count 2.

I. *Law of the Case*

In resolving Rivera-Martinez's prior appeal, we held unambiguously that the defendant had "advanced no fair and just reason for disclaiming his guilty plea . . ." *United States* v. *Pellerito*, 878 F.2d at 1543. We stated specifically that, notwithstanding the necessity for a re-

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frequent contact with him up to June 8, 1988 (the date upon which Rivera-Martinez pled guilty). Dr. Prieto's testimony was before the district court at the time Rivera-Martinez initially sought to retract his plea. *See Pellerito*, 878 F.2d at 1542.

[3] A third potential assignment of error has evaporated. We remanded appellant's case to enable him to obtain a psychological evaluation and, if the same "yield[ed] reasonable cause to question [his] competency" to be sentenced, to have a hearing on that score. *Pellerito*, 878 F.2d at 1546. After returning to the district court, appellant appears to have set sail in a different direction. We see nothing in the record below that calls into the slightest question his competency *to be sentenced*. Moreover, in his brief on appeal, the appellant does not contend that he lacked competency for sentencing purposes. The point has, therefore, been waived. *See, e.g., United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.) (absent some effort at developed argumentation on appeal, issues are deemed to have been abandoned), *cert. denied*, 110 S. Ct. 1814 (1990).

mand on issues related to sentencing, "defendant cannot now revivify his plea-withdrawal motion." *Id.* at 1545. We pointed out that, since Rivera-Martinez had "opted to forgo [psychiatric] evidence as a basis for plea retraction, [he] is foreclosed from belatedly questioning [his] competency at the time of the plea." *Id.* at 1545-46. Thus, we remanded *for the sole purpose* of "litigating an issue anent [the defendant's] competency to be sentenced" and for resentencing "if the competency issue is resolved in the government's favor." *Id.* at 1546.

Notwithstanding this tightly circumscribed set of directions, the district court, at the appellant's urging and over the government's objection, threw the gates wide open, undertaking plenary reconsideration of the original plea-withdrawal motion. In the end, the court once again found, on the augmented record, that appellant had failed to establish a fair and just reason for retracting his plea. Rivera-Martinez seeks to challenge this finding. We have no occasion to reach the merits of the challenge, however, because the court below lacked authority to resurrect the issue. We explain briefly.

In terms of the dynamics between trial and appellate courts, the phrase "law of the case" signifies, in broad outline, that a decision of an appellate tribunal on a particular issue, unless vacated or set aside, governs the issue during all subsequent stages of the litigation in the nisi prius court, and thereafter on any further appeal. *See Arizona* v. *California*, 460 U.S. 605, 618 (1983). As one commentary puts it:

> When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand. If there is an appeal from the judgment entered after remand, the decision of the first appeal establishes the law of the case to be followed on the second.

18 J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1] (2d ed. 1991). It follows, then, that "when a case is decided by an appellate court and remanded . . . any questions that were before the appellate court and disposed of by its decree become the law of the case and bind the district court on remand." *United States* v. *Belculfine*, 527 F.2d 941, 943 (1st Cir. 1975). *Accord Federal Deposit Ins. Co.* v. *Ramirez-Rivera*, 869 F.2d 624, 627 (1st Cir. 1989).

To be sure, the law of the case doctrine is neither an absolute bar to reconsideration nor a limitation on a federal court's power. *See White* v. *Higgins*, 116 F.2d 312, 317 (1st Cir. 1940); *see also Morgan* v. *Burke*, 926 F.2d 86, 91 (1st Cir. 1991) (warning against "transform[ing] 'law of the case' into a . . . straitjacket for a court"). Nonetheless, this modicum of residual flexibility does not mean that the doctrine can—or should—be lightly shrugged aside. To the contrary, the doctrine is a salutary rule of policy and practice, grounded in important considerations related to stability in the decision-making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy. The law of the case should be treated respectfully and, in the absence of exceptional circumstances, applied according to its tenor.

The litany of exceptional circumstances sufficient to sidetrack the law of the case is not only short, but narrowly cabined. We agree with the Fifth Circuit that issues, once decided, should not be reopened "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White* v. *Murtha*, 377 F.2d 428, 432 (5th Cir. 1967). *Accord Wheeler* v. *City of Pleasant Grove*, 896 F.2d 1347, 1350 (11th Cir. 1990); *J.E.T.S., Inc.* v. *United States*, 838 F.2d 1196, 1200 (Fed. Cir.), *cert. denied*, 486 U.S.

1057 (1988); *Handi Investment Co.* v. *Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981); *Melong* v. *Micronesian Claims Comm'n*, 643 F.2d 10, 17 (D.C. Cir. 1980); *Chicago & N.W. Transp. Co.* v. *United States*, 574 F.2d 926, 930 (7th Cir. 1978); *Petition of U.S. Steel Corp.*, 479 F.2d 489, 494 (6th Cir.), *cert. denied* 414 U.S. 859 (1973); *see also United States* v. *Rosen*, —— F.2d ——, —— n.5 (1st Cir. 1991) (embracing *Murtha* standard in applying previous ruling on same issue to codefendant's later appeal in criminal case); *United States* v. *DeJesus*, 752 F.2d 640, 642 (1st Cir. 1985) (per curiam) (citing *Murtha* with approval in connection with related aspects of law of the case jurisprudence). The second and third furcula of the *Murtha* regimen are plainly inapposite here: appellant makes no assertion that any revolutionary new legal doctrine has emerged; and we specifically decided in *Pellerito*, 878 F.2d at 1543, that the district court's initial decision was "beyond reproof." Injustice, manifest or otherwise, is not in prospect.

Appellant stands or falls, then, on the proposition that the medical evidence accepted by the trial court on remand constituted substantially different evidence of a kind sufficient to trigger the first *Murtha* exception. We think he falls. The "different evidence" exception to the law of the case doctrine does not apply when a trial court gratuitously jettisons the rule in order to address an issue explicitly decided, and foreclosed, in an earlier appeal in the same case. Any other outcome would severely undermine the efficacy of the doctrine. If, by the simple expedient of flaunting the law of the case, a trial court which should have deferred to an appellate court's resolution of an issue could proceed to address the issue anew, then the doctrine would disappear into thin air. Federal jurisprudence wisely prohibits trial judges from orchestrating self-fulfilling prophecies of that sort. *See, e.g.*, *Lyons* v. *Fisher*, 888 F.2d 1071, 1075 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2209 (1990); *United States* v. *Mazak*,

789 F.2d 580, 581 (7th Cir. 1986); *Goodpasture, Inc.* v. *M/V Pollux*, 688 F.2d 1003, 1006 n.5 (5th Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

We appreciate and respect the district judge's intentions, realizing full well his desire to be solicitous of the defendant's rights. But the road to bedlam—as well as to warmer places—is paved with good intentions. The appellant had already spent his day in court. Because the question of Rivera-Martinez's right to retract his guilty plea was decided once and for all in his first appeal, the trial judge was duty bound to adhere to that decision and stay within the scope of the remand. In the absence of exceptional circumstances, not present here, the law of the case doctrine applied. *See, e.g., Rosen*, —— F.2d at —— & n.5; *Lyons*, 888 F.2d at 1075; *Mazak*, 789 F.2d at 581; *DeJesus*, 752 F.2d at 642. Hence, the judge should not have purposed to revisit the matter.[4]

II. *Double Jeopardy*

On June 26, 1990, appellant was resentenced. The court sentenced him to 99 years in prison on count 1 of the indictment, which charged that appellant had carried on a continuing criminal enterprise (CCE) in violation of 21 U.S.C. §§ 848, 853. On count 2, which charged appellant with involvement in a narcotics-related conspiracy in violation of 21 U.S.C. § 846, the court imposed an identical sentence. On counts 3 and 4, wherein appellant was charged with aiding and abetting the distribution of heroin, 18 U.S.C. § 2, 21 U.S.C. § 841(a)(1), he received 25-year prison sentences.[5] All sentences were concurrent.

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[4] By resolving the assignment of error in this way, we do not suggest any lack of confidence in the lower court's latest refusal to allow the plea to be retracted. Were we to reach the issue, our review of the record, including the conflicted medical opinions, leaves little doubt but that the court's decision was supportable.

[5] The court also imposed fines on counts 1 and 2, terms of supervised release on all four counts, and a $50 special assessment on each count pursuant to 18 U.S.C. § 3013.

On appeal, Rivera-Martinez asseverates that the district court erred in sentencing him for both the CCE and conspiracy convictions. He also contends that he should not have been cumulatively sentenced for his aiding and abetting convictions.

The Double Jeopardy Clause mandates that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The protection of the Clause is threefold; it safeguards an individual against (1) a second prosecution for the same offense, following an acquittal; (2) a second prosecution for the same offense, following a conviction; and (3) multiple punishments for the same offense. *See North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969); *United States* v. *Ortiz-Alarcon*, 917 F.2d 651, 653 (1st Cir. 1990). Appellant's argument implicates the third of these protections. For reasons which will become readily apparent, we consider the argument in two stages.

1. *The Conspiracy Count.* Appellant's initial contention is that the district court impermissibly sentenced him on both the CCE count (count 1) and the conspiracy count (count 2). It is well established in this circuit that "[i]f a conspiracy offense is actually used to establish the 'continuing series of violations' and 'in concert' requirements needed to show an enterprise under 21 U.S.C. § 848, then cumulative punishment on the conspiracy charge and the § 848 CCE charge is barred." *Stratton* v. *United States*, 862 F.2d 7, 9 (1st Cir. 1988) (per curiam). The government concedes that, here, the conspiracy was used as a predicate act for proving the CCE, and goes on to concede that the concurrent sentences on counts 1 and 2 violate the proscription of *Jeffers* v. *United States*, 432 U.S. 137, 154-58 (1977) (plurality op.), against cumulative punishment, and hence, the Double Jeopardy Clause. The issue being forsworn, we need not pursue that point in greater depth.

The government does ask, however, that the conviction on the conspiracy count not be vacated. It asserts that,

in a case like this, the Double Jeopardy Clause only requires *that multiple sentences not be imposed. See United States* v. *Aiello*, 771 F.2d 621, 632-34 (2d Cir. 1985). A clear majority of our sister circuits, however, have rejected the *Aiello* view and required vacation of both the conviction and sentence attendant to the "lesser included" drug conspiracy charge when the defendant is also convicted of a continuing criminal enterprise. *See, e.g., United States* v. *Jones*, 918 F.2d 909, 910-11 (11th Cir. 1990) (per curiam); *United States* v. *Stallings*, 810 F.2d 973, 975-76 (10th Cir. 1987) (listing cases both ways); *see also United States* v. *Moya-Gomez*, 860 F.2d 706, 753-54 (7th Cir. 1988) (discussing seemingly inconsistent positions taken within the Seventh Circuit, collecting cases from other circuits, and describing *Aiello* rule as "a minority position"), *cert. denied*, 109 S. Ct. 3221 (1989).

We agree with, and adopt, the majority rule. Consequently, we order vacation of both the conviction and sentence on count 2. If we were to embrace the minority viewpoint and allow the conspiracy conviction to stand on the theory that no additional punishment flowed from it, we would needlesly erode the prophylaxis afforded by the Double Jeopardy Clause.

Ball v. *United States*, 470 U.S. 856 (1985), serves as our polestar. In that case, the Court held that when a defendant was convicted on two statutory charges, and Congress did not intend that the conduct should be punishable under both statutes simultaneously, the proper course was to vacate one of the convictions. *Id.* at 864. The *Ball* Court rejected the idea that ordering one of the sentences to be served concurrently with the other could be squared with congressional intent, thereby skirting an incipient double jeopardy problem. The Court reasoned:

> The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences, that may not be ignored. For example, the

> presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. See *Benton* v. *Maryland*, 395 U.S. 784, 790-91 (1969); *Sibron* v. *New York*, 392 U.S. 40, 54-56 (1968). Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

Id. at 865.

Like the Eighth Circuit, *United States* v. *Maull*, 806 F.2d 1340, 1346-47 (8th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987), we think that the *Ball* analysis applies in cases like the one at bar. Since Congress did not intend to punish a defendant for the same conspiratorial conduct under both sections 846 and 848, it is not enough to sentence concurrently, or to sentence only on the CCE charge. Even a guilty defendant has constitutional rights. The Double Jeopardy Clause protects those rights. It requires that the section 846 conviction be erased from the docket.

2. *The Aiding and Abetting Counts.* Appellant also argues that the district court erred by sentencing him separately on the CCE count and on the two convictions for aiding and abetting the distribution of narcotics in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1). We disagree. The question of whether a defendant, within the contours of a single prosecution, may be subject to separate sentences stemming from a single course of conduct revolves around legislative intent. *See Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."); *Jeffers*, 432 U.S.

at 155-56; *United States* v. *Jefferson*, 782 F.2d 697, 700 (7th Cir. 1986). The conventional test for determining whether Congress intended separate punishments under separate statutes was crafted in *Blockburger* v. *United States*, 284 U.S. 299 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of a fact which the other does not.

Id. at 304; *see also Ortiz-Alarcon*, 917 F.2d at 653-54 (*Blockburger* test remains in constitutional vogue in multiple punishment cases). We are quick to note, however, that the *Blockburger* test is only a rule of statutory construction. It is not controlling where "there is a clear indication of contrary legislative intent." *Hunter*, 459 U.S. at 367, quoting *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981). This is such a case.

The defendant strives to cast our inquiry in terms of deciding whether or not the predicate counts of aiding and abetting are lesser included offenses of the CCE count. Were we to adopt that approach, and woodenly apply the *Blockburger* test, the argument for double jeopardy would be a powerful one. But the appellant is fishing in an empty stream. The Supreme Court made it very clear that the *Blockburger* test is inappropriate in analyzing section 848 because "logic supports the conclusion, also indicated by the legislative history, that Congress intended separate punishments for the underlying substantive predicates and for the CCE offense." *Garrett* v. *United States*, 471 U.S. 773, 795 (1985); *see also Jones*, 918 F.2d at 911 (noting that *Garrett* allows for separate sentences on both a section 841(a)(1) predicate offense and a section 848 CCE conviction); *Jefferson*, 782 F.2d at 701 (same); *United States* v. *Burt*, 765 F.2d 1364, 1369 (9th Cir. 1985) (same). The only question, then, is whether the aiding and abetting counts charge

substantive acts within the contemplation of the *Garrett* Court.[6]

Of this, there can be no legitimate doubt. The statute criminalizing aiding and abetting reads in material part: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). By the use of this language, the statute "abolishes the distinction between common law notions of 'principal' and 'accessory.' Under it, the acts of the perpetrator become the acts of the aider and abettor . . . ." *United States* v. *Kegler*, 724 F.2d 190, 200-01 (D.C. Cir. 1984). Thus, aiding and abetting is a substantive crime to which *Garrett* applies full bore. *Accord United States* v. *Phillips*, 664 F.2d 971, 1010 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982). We need go no further. There was no constitutional impediment to the imposition of cumulative sentences on the CCE count and on the two aiding and abetting counts.

The judgments of conviction and the sentences imposed on counts 1, 3 and 4 are affirmed. The conviction and sentence on count 2 are vacated. The papers in the case are remitted to the district court for such entries as may be required to implement the foregoing.

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[6] The *Garrett* Court was careful to distinguish between conspiracy and substantive predicates. *See Garrett*, 471 U.S. at 794. As the government concedes, *Garrett* does not undermine the established rule that cumulative punishments cannot be imposed for both a predicate conspiracy and an overall CCE conviction, *see supra* Part II(1).

APPENDIX C

FERNANDO J. CABRERA, M.D., F.A.P.A.

Apartado 3802
G. P. O.
San Juan, P.R. 00936

PSYCHIATRIC EVALUATION

RE: Rivera-Martinez, Héctor
Criminal Case: 87-685(JAF)

Forty-four years old male, Puertorrican, who was born in La Perla, San Juan, Puerto Rico and he went to school up to 5th grade elementary school at the Lincoln Elementary School in Old San Juan. He used to do odd jobs in his life and the last one was as lottery ticket vendor. In November 7, 1987 he was arrested together with his mother, wife and son and was charged with organized crime, corruption and selling of narcotics. He came for psychiatric evaluation as per order of Honorable Judge Fusté and also for psychological evaluation.

HISTORY OF PRESENT CONDITION:

I saw the patient on April 2 and May 8, 1990 and my psychologist saw him on April 2, 3, and 4, 1990. Discussion of the psychological results with me before surrundering the written report was carried out.

Mr. Rivera-Martinez was raised by his mother until the age of 11 and by a neighbor as his mother earned her living as a prostitute; at age 12 he went to New York to live with his father but returned to Puerto Rico. At age 13 he started smoking marihuana. He returned to New York at the age of 14 to live with a paternal uncle where he earned his living washing dishes and he also began to use heroine. At that time he returned to Puerto Rico and

was one of the first patients of Cisla, directed by Dr. Efren Ramirez. He fled from the treatment center and was arrested on account of robbery and was send to a correctional facility in Mayaguez. He was send back to Sisla which he left before a year. He was married for the first time having two boys and a girl which was born with a defect and he went back to New York in order to seek medical treatment for his daughter who suffered from a severe heart murmur, he used heroine, amphetamines, marihuana. His daughter died and sell everything and returned to Puerto Rico and started selling lottery tickets. He continued using heroine, cocaine, marihuana and amphetamines; once he tried LSD. He married again for the second time having two children. He had a very closed relationship with his mother and with the children of the first and second marriage. He was hospitalized in San Pablo Hospital in early 1987 for six days in the Intensive Care Unit after suffering from a severe arterial hypertension attack and a possible myocardial infarction.

He was arrested in November 7, 1987. While waiting trial, at the Penitenciary, he was prescribed Percocet (analgesic) 1 tablet t.i.d.; Catapres (for the blood pressure), Halcion (Benzodiazepine and hypnotic) 1.0 mg. 3 h.s., Xanax (Benzodiazepine and anxiolitic) 1.0 mg. t.i.d., Tranxene (Benzodiazepine and anxiolitic) 15 mg. b.i.d., Valium (Benzodiazepine and anxiolitic) 10 mg. t.i.d., Restoril (Benzodiazepine and hypnotic) 30 mg. Sinequan (Antidepressant) 100 mg. b.i.d. Before the trial proceedings he crushed all the tablets first smell them and then swallowed them; he pleaded guilty after having talked to his mother.

He began to retire voluntarily the medication prescribed by the prison doctor. At the present time he is on Procardia, Capoten 25 mg., Lobid for the cholesterol b.i.d., Zantac b.i.d.

MENTAL STATUS:

We found a forty-four years old male dressed in prison garments. He was very friendly, cooperative, drank black coffee both times he was interviewed. He was coherent, relevant, with appropriateness in the affect. There was no evidence of delusions, illusions, or any kind of hallucinations. There was no complaint of somatization. Most of his conversation was about the medication that was prescribed in the penitenciary for his different medical conditions. He was well oriented in the three spheres. Memory for recent and remote events excellent. Intellectual resources a little above average. Judgment was fair and he had good insight in his condition.

CONCLUSIONS:

It is my personal opinion that we have to prepare a course for the doctors in how to prescribe benzodiazepines, as he was taking several benzodiazepines prior to his trial and this medication have accumulative and anticholinergic effects; but since this is not the issue in this case I believe this patient is competent to withstand trial, to help his lawyer and help in his defense; and he is mentally responsible for any charges that might have been placed against him. This individual has a long history of heroine, cocaine, marihuana and amphetamine abuse which are at the present time all in remission. I agree with the psychologist's evaluation that there was no signs of any psychotic behavior and there was no impairment in his intellectual and emotional functions. He has no severe mental disorder nor severe mental illness.

DIAGNOSIS:

Axis I: Psychoactive substance use disorder (Cocaine, Heroine, Marihuana, Amphetamines) in remission

Axis II: Borderline personality disorder

Axis III: Arterial hypertension
Myocardial infarction, possible history

Axis IV: Long standing history of broken family relationships since early childhood

Axis V: Poor—he has not work for years as he has been incarcerated

/s/ Fernando J. Cabrera, MD
FERNANDO J. CABRERA, MD
FAPA Psychiatrist
582-58-4238

FJC/ssm

April 2, 1990
May 9, 1990

APPENDIX D

Bankers Finance Tower
Munoz Rivera #654
Suite 915
Hato Rey, P.R. 00918 Tel. (809) 756-6230

Psychological Evaluation

June 4, 1990

Name: Héctor M. Rivera Martínez

Age: 44

Date of Birth: February 7, 1946

Marital Status: Married

Informant: Patient

Education: Fifth grade

Referred by: C. López de Azúa

Dates of Examination: April 2, 3, 4, 1990

Tests used: E.I.W.A., Rorschach, Clinical Interviews, Observations:

The patient was referred by his attorney, Mr. C. López de Azúa, in order to determine his present mental status, emotional condition and his capacity to assist his attorney in his defense.

The patient was examined on April 2, 3, 4, of 2990. He was brought to the examiners office by several U.S. Marshals. He was handcuffed during the examination process and the door was not fully closed, upon the request of the Marshals. They politely requested the above mentioned condition. The present examiner had doubts with regard to the appropriateness and confidentiality of the testing conditions. In spite of all the above, the patient

was very cooperative and in good spirts. Rapport was established rapidly and the evaluation process was completed. The interview and tests were conducted in Spanish because that is the patient's native language.

History:

Mr. Rivera Martínez was born in La Perla, San Juan, on February 7, 1946. He lived there with his mother who was a prostitute until he was 11. He then moved to New York with his father and stepmother for a year when he returned to Puerto Rico and strarted smoking marijuana. He returned to New York to live with an uncle while working in a restaurant washing dishes. He then started using heroine. Moving back to Puerto Rico he entered a drug addiction program called "Cisla". He remained there for two years before leaving the program. He was arrested for robery and taken to a Mayagüez correction facility. Returning to "Cisla" he completed the year. He then married and had two boys and a girl. Returning to New York to seek medical attention for his sick daughter, he entered Manhattan General Hospital in November of 1967 for his drug addiction. For two years he did community service while in this program. Divorcing his wife at this time he soon went back to drugs. He returned to Puerto Rico and started to use heroine, cocaine and marijuana again. To sustain himself, he sold lottery tickets. He moved to Cataño near his mother and sister and remarried. The patient admits that he tried to return to a rehabilitation program, but family pressures were to great. In 1987 he was arrested and charged with "organized crime and conspiracy".

According to Mr. Rivera-Martínez, he was suffering from extreme duress during the time of the trial. He had lost all of his property, his children were under the care of his sister and sister-in-law. A penitentiary doctor prescribed him Sinequan (Antidepressant) 100 mg. b.i.d., Valium (Benzodiazepine and anxiolitic) 10 mg. t.i.d.,

Xanax (Benzodiazepine and anxiolitic) 1.0 mg. t.i.d., Halcion (Benzodiazepine and hypnotic) 1.0 mg. 3 h.s., Restoril (Benzodiazepine and hypnotic) 30 mg., Tranxene (Benzodiazepine and anxiolitic) 15 mg. b.i.d., Catapres (for the blood pressure), and Percocet (analgesic) 1 tablet t.i.d. The intake of such drugs and its chemical combination had many effects upon him, for example, most probably he was not able to think clearly nor logically, to associate ideas or events, to draw correct conclusions, to be able to anticipate consecuences, to think coherently nor to assist in his own defense. Before the trial he spoke to his mother on the phone who urged him to declare himself guilty. He states that after talking to her, he crushed the pills, inhaled some, drank the rest and when he entered the courtroom declared himself guilty. His lawyers tried to disuade him, but to no avail.

According to the patient, he was constantly being pressured by Dr. Prieto, the penitentiary physician, to "cooperate" with the U.S. attorneys and to change his plea to guilty. He also states that he was pressured to change his plea to guilty by the U.S. Marshals by placing him in an isolation cell from April until June. He felt that by interupting the normal flow of relations with other prisoners, he had nobody to talk to, exchange ideas or emotions or to receive necessary feedback.

He also admits that by changing his plea to guilty, his mother and other relations would receive a "lighter" sentence. This added pressure to a change of plea.

The patient admits that when he was asked if he had taken drugs or medicine or if there were any factors that might impair his sound judgment, logical thinking or decision making, he did not tell the truth. He justifies this lie because he wanted to "get it over with" to relieve himself of any internal or external pressure, he also wanted to help his family and to be removed from the isolation cell.

According to the patient, now that he is free from the effects caused by drugs and prescribed medicine, he has recovered his logical thinking and decision making process so he now realizes that he made ilogical, unwise decisions which are having a very detrimental effect on his life.

Test results show that the patient is functioning intelectunly above average as his score is compared with those of a sample of subjects with similar socio-economic carachterstics. His verbal I.Q. was 99. His performance I.Q. was 118. All of the subtest scores were within normal limits.

Interview and test analysis show that the patient has been suffering from a severe and chronic drug addiction. The Rorschach profile shows that the personality structure is carachterized by oral dependancy, impulsivity, emotional blunting, poor insight, a strong tendancy to escape reality, a very intense fantasy life, and a tendancy for self destruction. This can be concluded as an Anti-social Personality.

At the behavioral level, the patient is in contact with reality. There is no evidence of delusion or halucination. He can understand and communicate with others in Spanish. His judgmental capacity is superficial and his capacity for insight is still very poor. At the present moment he can assist his own defense. His capacity to recall past and present events is sound. He can think logically and draw correct conclusions from events and is aware of the consecuences of his thoughts, decisions and behavior.

At the moment he changed his plea most probably he was not aware of the consecuences nor was he able to defend himself nor to assist in his own defense.

/s/ Agustin Garcia Ph.D.
DR. AGUSTIN GARCIA-PH.D.
Psychologist